NO. 85-1033

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT
CHIEF STATE'S ATTORNEY, ET AL.,

Petitioner,

V.

CAROLYN ROBINSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states, each of which uses different penal sanctions for different cases to enforce its criminal laws. Amici use sentences that include probation, with conditions tailored to the offense and offender. Amici's penal sanctions include, in many cases, requirements that offenders pay sums of money corresponding to victims' losses, as a condition of probation or through other judicial mechanisms.

The characterization of such a condition of probation in such a case as a "debt" dischargeable in bankruptcy is erroneous. It fails to recognize the important function that such sanctions serve in carrying out penal goals of deterrence, prevention, rehabilitation and proportional justice. Amici would be deprived of the flexibility to use the best available penal sanction to fit major categories of crimes, and would probably be forced into the use of sentences of incarceration when that sanction would otherwise be unnecessary, if the result in the court of appeals were to be considered correct.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioner, the Chief State's Attorney for the State of Connecticut.

SUMMARY OF ARGUMENT

I.

Criminal restitution imposed as a condition of probation is not a mere civil "debt." Instead, it is a penal sanction that the states use to carry out their criminal justice objectives of deterrence, rehabilitation, incapacitation, and proportional justice. The scholarly writings of penologists convincingly demonstrate that the principal advantage of restitution as a criminal sentence is that it enhances rehabilitation by forcing the offender to confront the consequences of his conduct.

The lower court erred in equating criminal restitution with the equitable remedy of "restitution" in civil cases. The two have little in common other than the name. Furthermore, the lower court's analysis of debt as a broadly defined concept failed to recognize that even a broad definition must have limits. Fines, penalties, and even prison sentences may be loosely described as "debts" to society, but they are not dischargeable in bankruptcy. The respondent in this case could have been required to undertake community service that would have been the exact equivalent of the payments required here, yet it would be artificial to hold this sanction dischargeable while the community service would not be.

II.

Discharge of criminal restitution is inconsistent with the "fresh start" policy underlying the Bankruptcy Act. It would leave the states in some cases with no alternative but to incarcerate the bankrupt. Objection to discharge is not a solution Congress could have intended; it would require the prosecution and trial of a second lawsuit after conviction and would neces-

sitate the reassignment of indeterminate numbers of assistant district attorneys as bankruptcy lawyers instead. Furthermore, the Bankruptcy Code does not contain discharge exceptions for every criminal act, and therefore the Court of Appeals' decision, if upheld, would nullify many restitutionary sentences even if the full objection process were pursued. The Act is designed to redress honest business overextension, not to absolve convicted offenders from sentences for their crimes.

PRELIMINARY STATEMENT

Amici curiae will not duplicate Petitioner Kelly's thorough analysis of the case law and statutory text, although amici agree with that analysis and wish to express support for it. Instead, this brief concentrates upon issues of policy.

There have been a number of decisions concerning the issue raised by the case at bar. Virtually all are contrary to the court of appeals' decision in this case, although the court correctly cited one trial court decision that supported its result.[1]

The reason for this near unanimity of opposition to the decision below is well expressed by the concurring judge: the decision amounts to an "unfortunate loophole" that was never intended by Congress and that would, if upheld, "stultify and render useless" criminal restitution sentences. Slip op. at 30. Effective and diligent attorneys would naturally respond to the decision by seeking discharge of conditions of probation throughout the United States. Judges who would otherwise use probation conditions as substitutes for incarceration could not know that this sentence would be valid. That result would mean that

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1 The court, below, correctly stated that "[a] majority of the courts that have considered this issue have . . . held . . . criminal restitution . . . not a debt . . . ." Slip op. at 9. The majority of cases follow *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), with which the lower court stated it disagreed. *Id.* It said, "The lone exception, so far as we are aware, is *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984)." *Id.* at 12.

the states could not use probation as an effective sanction to enforce their penal laws, and, therefore, many conscientious judges could be expected to use other sanctions instead, including incarceration.[2]

I. THE CONDITION OF PROBATION AT ISSUE IN THIS CASE WAS NOT A MERE CIVIL "DEBT." INSTEAD, IT WAS A PENAL SANCTION USED BY THE STATE TO CARRY OUT ITS POLICIES OF DETERRENCE, INCAPACITATION, REHABILITATION, AND PROPORTIONAL JUSTICE.

At one time, felonies were uniformly addressed by very severe penalties. That approach has given way, today, to more flexible sanctions.[3] Incarceration was used as an early substitute for capital punishment, and, later, probation upon specified conditions was used as an alternative to incarceration. All of these sanctions, however, share common characteristics. They are attempts by the State to carry out its policies of deterrence, prevention, rehabilitation, and proportional justice.[4]

Conditions of probation play an important part in the achievement of these policy goals. Probation for a less serious offense, for example, may carry few conditions other than standardized ones such as reporting and nonviolation of the law. Probation for more serious offenses, on the other hand, may incorporate requirements that force the probationer to confront and appreciate the effects of his criminal act. Thus probation

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2 *See In re Pellegrino, supra.*

3 *Cf. Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (recognizing a "variety of flexible techniques—probation, parole, work furloughs, to name a few"—that are available in non-capital cases). Probation with restitution conditions is a part of that flexible set of sanctions.

4 *See generally* S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES ch. 3 (4th ed. 1983).

may be conditioned upon a brief period of incarceration. Alternatively, it may be made a condition of probation that the offender perform a certain number of hours of community service. Requiring a drunk driver to assist in hospital emergency rooms, for example, may serve policies of general deterrence, specific deterrence, rehabilitation and proportional justice by forcing the offender to confront the consequences of his offense.

1. In many cases, conditions of probation incorporating monetary payments are the superior means of accomplishing the State's penal purposes underlying the criminal law. The State's penal purposes may best be served, in many cases, by probation conditions requiring monetary payments to victims. Such a penal sanction works because it is a deterrent both general and specific; because it has rehabilitative effects; and because it communicates both to the victim and to the society at large that justice has been done. In fact, such victim payment conditions have been supported on the precise ground that they are highly effective in forcing the offender to confront, in the most tangible and measurable way, the harmful consequences of his offense.[5] As such, these conditions may be the best available penal sanctions in some kinds of cases.

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5 For an excellent discussion, see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932 (1984).

> [T]he criminal law's main goals are rehabilitation, deterrence, and retribution; consequently, criminal law focuses on punishing and reforming . . . . Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make victims whole, but rather its utility as a corrective device.

Id. at 937.

> Expert authorities express the view that only a minority of victims are benefitted directly by restitution. A condition requiring restitution depends upon apprehension, conviction and offender solvency; logically, therefore, restitution cannot be the basis of a systematic effort to compensate victims injured by persons who after all, more frequently are *not* apprehended. If general compensation is the goal, victim compensation programs of a quasi-insurance

The Court of Appeals gave inadequate consideration to the purposes of the penal sanction at issue. Victim payment programs administered as conditions of probation are important penal sanctions and are worth saving. However, the concurring judge, below, was certainly correct when he stated that this decision will "stultify and render useless" such programs "*as a means of punishing persons convicted of felonies.*" [6]

2. Scholarly analyses of criminal restitution confirm that it is a penal sanction with primary benefits to the offender and

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type can accomplish what restitution cannot. *See* Edelhertz, *Legal and Operational Issues in the Implementation of Restitution in the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63-64 (J. Hudson & B. Galway eds. 1977).

Some experts therefore conclude, often in very definite terms, that a restitution program is actually likely to prove unsuccessful if viewed as having the goal of compensation, and that it will work best if viewed, instead, as effecting a penal sanction having as its goal the reform of the offender. For example, Edelhertz says:

> [T]he [restitution] programs that are actually established invariably focus on correction or rehabilitation of offenders. *No restitution program has come to my attention that had the delivery of benefits to victims as a primary or even very important operational goal.*

Id. While amici curiae may retain differing views of the subject, and would certainly regard as beneficial those compensation effects actually resulting to victims, this conclusion of the expert authorities conflicts sharply with the statements of the court below and further demonstrates the inadequacy of the Court of Appeals' reasoning.

The rehabilitative effects of restitution are borne out by empirical research. Challeen & Heinlen, *The Win-Onus Restitution Program*, in OFFENDER RESTITUTION IN THEORY AND ACTION 151, 155 (B. Galway & J. Hudson eds. 1978) (demonstrating lower recidivism rate for offenders who participated in restitution program). *See also* Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 312-13 (1984).

6 Slip op. at 30 (emphasis added). The concurring judge's recognition that restitutive payments are not primarily compensatory, but rather are a "means of punishing persons convicted of felonies," supports the conclusion that they are a penal sanction rather than a debt.

to society as a whole. The following list includes some of the recognized benefits of criminal restitution:

1. Restitution is more rehabilitative than other correctional measures.[7] One reason is that it is rationally related to the harm done and thus is perceived as more just by the offender.[8]
2. Restitution is seen by the offender as specific to the criminal act.[9] This perception also increases its rehabilitative effect.
3. Restitution allows for a clear sense of accomplishment as the offender completes concrete requirements.[10]
4. Restitution requires the offender to be actively involved in the program of reform.[11]

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7 *See supra* note 8.

8 Galaway, *Toward the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 82, 83 (J. Hudson and B. Galaway eds. 1977) (hereinafter cited as Galaway).

The great majority of states view restitution as a method of rehabilitating the offender. Baker, *Restitution for Crime Victims: The California Legislature Responds to Proposition Eight*, 14 SW. L. REV. 745, 749 (1984).

9 *Id.* In fact, at least one scholar has proposed the creative use of criminal restitution in which the restitutionary act is related to the destructive act. For example, one found guilty of vandalism would be ordered to clean the site vandalized. Eglash, *Creative Restitution*, 48 J. CRIM. L. & POL. SCI. 619, 622 (1958). Although this proposal would be difficult to administer, it forcefully demonstrates the rehabilitative goal that underlies all forms of restitution. Further, it shows how artificial it is to label criminal restitution a "debt" merely because it uses payment to confront the offender with his crime.

10 *Id.*

11 *Id.* Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 NEW ENGLAND J. OF CRIM. & CIV. CON. 329 (1983) (hereinafter cited as Casson).

5. Restitution provides a socially appropriate way of expressing guilt and securing a sense of atonement.[12]
6. Through restitution, the offender is likely to elicit a more positive response from persons around him than the offender sent to prison or receiving some other sort of sanction.[13] Thus, it enhances self-respect.
7. Restitution reduces demands on the criminal justice system. Restitution programs are less expensive to operate than prisons and, if properly managed, they help pay their own operating expenses.[14]
8. Restitution reduces the need for vengeance in society, because offenders are perceived as responsible persons taking active steps to make amends for wrongdoing.[15]

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12 There are two ways an individual can alleviate the guilt he feels when he hurts others: through restitution or through justification and denial of responsibility. Macauley and Walster, *Legal Structures and Restoring Equity*, in CONSIDERING THE VICTIM 291 (J. Hudson & B. Galaway eds. 1975). *See also* Casson at 383-384. Restitution thus provides a constructive outlet for guilt.

13 Galaway at p. 83; E. ZEIGEN HAGEN, VICTIM, CRIME AND SOCIAL CONTROL 44 (1977).

14 Galaway at p. 83.

15 *Id.* The reduction-of-vengeance factor has been described in this way:

> The [criminal] punishment, proportioned to the harm, is emotionally felt as compensation for the public damage done. The public, so to speak, takes its pay in the pelt of the offender himself.

Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 775, 967, 969, 971 (1943). *See also* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932, 941 (1984).

9. By ordering restitution, a court forces the defendant to acknowledge in concrete terms the harm he has caused.[16]
10. Because restitution is less restrictive of liberty than is imprisonment, but graver than probation, it bridges the gap between traditional sentencing alternatives.[17]
11. Restitution impresses upon the offender his responsibility to others.[18]
12. Restitution is an effective deterrent.[19]
13. When restitution is ordered as an alternative to incarceration, it allows the offender to support himself and his family and it saves the state anywhere from $10,000.00 to $20,000.00 in annual confinement expenses.[20]

The historical origins of criminal restitution also demonstrate that it is a penal sanction.[21] Initially, restitution was designed to benefit the offender rather than the victim in that it was the means whereby the offender and his kin group made amends to

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16 Note, 97 HARV. L. REV. at 938.

17 *Id.*

18 *Id.*

19 *Id.* at 939.

20 The importance of restitution as an alternative to incarceration cannot be overemphasized. If the decision of the court of appeals is upheld, courts may be forced to order incarceration in cases in which restitution would otherwise have been used. The consequences to society would be severe. The most obvious result is the cost: It costs a great deal to support a person in prison when, on the other hand, he could not only be making restitution for his criminal actions but also supporting himself and his family. Casson at 352.

21 Note, 97 HARV. L. REV. 932, 933 (1984).

the victim and his kin group and thus avoided a more severe sanction which the victim's kin group could legitimately impose. The primary purpose of restitution, historically, was not to compensate the victim, but to protect the offender from violent retaliation by the victim or community. Therefore, the focus was on the offender.[22]

In our modern society, the focus of restitution is still on the offender.[23] Many statutes specify that restitution should only be ordered if it will promote deterrence or the offender's rehabilitation.[24] In contrast, in the civil context, courts ordering restitution do not consider its impact upon the defendant. Furthermore, civil damages allow recovery of full compensation for mental anguish, pain and suffering, and other real losses, which criminal restitution in most states does not attempt to provide.[25]

3. The lower court confused the law by equating the equitable remedy of civil "restitution" with the entirely different

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22 Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. 152, 154-55 (1970).

23 In ordering restitution, courts assess a wide range of factors relating to the offender's personal characteristics and degree of culpability. Most courts recognize that a defendant who is ordered to pay an amount beyond his financial ability will experience frustration that may adversely affect his prospects for rehabilitation, so they adjust the amount of restitution to the offender's ability to pay. Note, 97 HARV. L. REV. at 939-40.

24 *E.g.* Ark. Stat. Ann. 41-1201(d) (1977); N.J. Stat. Ann. 2C:44-2a(2) (West 1982). Note, 97 HARV. L. REV. at 939.

25 In the criminal context, restitution generally is limited to the actual damages directly caused by the crime. Victims do not receive recompense for pain and suffering and loss of earning capacity. Although this limitation may result in less than full compensation of the victim, one commentator has said "it may well promote the offender's reform. When the defendant believes the amount of the award is fairly related to the damage he has caused, rehabilitation is more likely." Note, 97 HARV. L. REV. at 941.

criminal sanction of victim "restitution." The Court below erroneously reasoned that victim "restitution" payments required as a condition of probation by a criminal court are equivalent to, and a subclass of, equitable "restitution" remedies of the kind that might be ordered by a civil court.[26] This reasoning was superficial and serves only to confuse the issues. There is in reality no relationship between equitable "restitution" and victim "restitution" as a penal sanction, except for the name.

Equitable restitution is a remedy distinguishable from compensatory damages, punitive damages, and specific performance, in that it influences the way in which a civil court may compute the civil measure of recovery upon which the plaintiff may levy execution.[27] Probation conditions are entirely different, may be measured in ways unrelated to equitable measures, may not provide for full payment of the victim's loss, may take into account the wage earnings of the offender, may involve a schedule tailored to his abilities, and, in short, may be tailored to serve the objectives of a criminal, penal sanction, rather than the rigidly defined individual remedy that a private creditor would have in a civil court in collecting a "debt."[28]

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26 The court said, for example, that it saw no indication "that Congress intended some rights to restitution but not others to be within the definition of claim." Slip op. at 14. This reasoning fits civil restitution, in which there is a "claim," but it does not fit a judgment of probation, to which the victim is not a party and obviously does not present a "claim."

27 *Cf.* K. PARKER, MODERN JUDICIAL REMEDIES 12, 27-35 (1975).

28 In fact, Robinson was required to pay $100.00 per month. The total amount she would pay over the five-year probationary period was $5,800.00, and this amount would be considerably less than the $9,932.95 stolen by her. *See* Brief of Petitioner, Statement of the Case.

This flexible probation order is consistent with the use of the penal sanction. Conn. Gen. Stat. Ann. sec. 53a-30(a)(4) (West Supp. 1985) empowers the trial judge to take account of the offender's circumstances and ability "to pay" and gives him broad discretion in doing so.

4. A penal sanction such as a prison term, community service, or a condition of probation requiring payment, may informally be characterized as a "debt to society," but it is not thereby transformed into a debt dischargeable in bankruptcy. In its reasoning, the Court of Appeals considered only that authority under the Bankruptcy Act that requires the "broadest possible" interpretation of "debt," and the Court failed to consider that even a broad definition has limits at some point. For example, a person sentenced to a prison term is accurately (if informally) said to have a "debt" to society, but it would make no sense to regard that sentence of years in prison as a "debt" dischargeable in bankruptcy.

Similarly, community service might loosely be called a "debt to society." In the present case, for example, Carolyn Robinson might as appropriately have been sentenced to spend several hundred hours of community service to the benefit of public welfare recipients, and that obligation (in theory) could be made to be the precise equivalent, in effort and in effect, of the probation condition in the present case. yet it clearly would not be a "debt" for discharge purposes.[29] Likewise, some States would require a person in Robinson's position to pay a penalty into a common fund for general victim compensation; such a payment would be, metaphorically, a "debt" to society, but it would obviously not be a debt subject to bankruptcy discharge.[30]

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29 Such a sentence, however, would be inferior, in many instances, to probation with a condition requiring restitution. For example, it often would interfere with the duties of the offender in keeping custody of his or her children.

30 Criminal restitution is "a constructive alternative to the severity of imprisonment and the leniency of probation." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984). "The sanction can take a variety of forms. A court may order an offender to pay money directly to the victim, to participate in a work program in which a portion of his salary is paid to the victim, to render services to the victim, or to work for the community in lieu of repayment of the victim." *Id.* at 933.

Each of these sentences would share, in common with the condition of probation at issue here, the characteristics of a penal sanction, designed to further goals of deterrence, prevention, rehabilitation and proportional justice. The use of a simplistic definition of "debt," such as that used by the court below, would undermine the State's criminal justice system by precluding the use of what are not debts at all but penal sanctions. This result would be equally irrational in these examples and in the case at bar.

Connecticut's primary goal in this case is not the collection of $9,932.95 as a civil "debt." Instead, Connecticut seeks to reduce theft in the future, by Carolyn Robinson and others, by vigorous prosecution followed by appropriate sanctions that carry out the State's policies of deterrence, prevention, rehabilitation, and justice. That result cannot follow if Robinson keeps the money she has stolen and has the sanction of the law in doing so. The $9,932.95 is a necessary but incidental consideration in that larger purpose, for which Connecticut would undoubtedly be willing to spend much more than $9,932.95.

II. THE "FRESH START" POLICY OF THE BANKRUPTCY ACT IS NOT SERVED BY FORCING CONNECTICUT INTO A SITUATION IN WHICH IT HAS NO ALTERNATIVE BUT TO INCARCERATE THE BANKRUPT.

This Court has described the purpose of the Bankruptcy Act as follows: [31]

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31 *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

It has also been suggested that discharge "liberates the bankrupt psychologically." Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 726 (1980). But since the very purpose of restitution is for the offender to be psychologically liberated by making amends for the crime, the court of appeals' decision also contradicts this policy.

> "One of the primary purposes of the Bankruptcy Act is to 'relieve the *honest* debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the Act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the *honest* but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting *debt. The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.*" (emphasis added).

Respondent is not seeking to be released from "the pressure and discouragement of preexisting debt" incurred through "business misfortunes." Furthermore, it is inconceivable that Congress, in enacting the Bankruptcy Code, intended for state criminal justice systems to comply with all the procedures that unsecured creditors have to comply with, in order to receive criminal restitution ordered as part of a penal sanction after conviction.[32] The

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32 The court of appeals suggested, erroneously, that the State could prevent this result by objecting to discharge.

That solution would require that the State reassign large numbers of assistant district attorneys to serve, instead, as bankruptcy lawyers. "Objecting" to discharge, and doing so effectively, is a complex procedure, equivalent to a civil suit. It requires a complaint; attendance at creditors' and various other pretrial meetings; discovery; a pretrial order; and, as in any other civil suit, proof by the objecting party of its grounds at a trial. It is possible that the State could be denied the benefits of offensive collateral estoppel,

court of appeals' decision places bankruptcy courts in direct conflict with state processes for criminal justice.[33]

The basic policy of the Bankruptcy Act is to provide a "fresh start" to persons who have, through inadvertence, become overextended.[34] "The Bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension."[35] The decision below will defeat that very policy of "fresh start" by forcing Connecticut and other States into harsher alternatives.

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see Haring v. Prosise, 103 S.Ct. 2368 (1983), and therefore it could be faced with the requirement that it prove the elements of the crime all over again, as well as the amount of restitution.

Furthermore, objecting to discharge would be ineffective if the offense did not fit the categories of crimes for which discharge can be prevented. For example a person who committed a reckless assault and caused severe personal injuries to another individual would be immune from objection and could avoid a sentence of restitution by bankruptcy.

Finally, the "objection" procedure assumes a need for case-by-case determination of the existence of the underlying crime. That effort is unnecessary, and Congress certainly would not have intended to require it, when the entire category of sentences sought to be discharged has already, by definition, been judicially determined to involve criminal offenses.

33 The court of appeals here has violated the "long-standing tradition of restraint by federal courts from interference with traditional functions." *See Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesman*, 401 U.S. 82 (1971); *In re Pellegrino*, 42 B.R. 129 (1984). This is particularly true of state criminal proceedings, such as the Connecticut criminal proceeding in the instant case. *In re Pellegrino*, 42 B.R. at 134; *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982).

34 *Perez v. Campbell*, 402 U.S. 637 (1971) (expressing fresh start doctrine); *see also* 3 L. KING, COLLIER ON BANKRUPTCY para. 525.02 (15th ed. 1985).

35 *In re Pellegrino, supra.*

Connecticut simply cannot surrender its interest in deterrence, prevention, rehabilitation and proportional justice. Occasional miscarriages in individual cases, in which these goals may fail of achievement, might be tolerable; but systematic failures, in which major categories of offenders achieve virtually complete immunity from any penalties whatever upon conviction, are not. Thus the question raised by the decision below, and it is a substantial one, is: What is Connecticut to do in the cases of future Carolyn Robinsons?

If deprived of the ability to use conditions of probation to achieve its valid penal objectives, the State of Connecticut may be forced into a situation in which it has no alternative but to incarcerate persons in Carolyn Robinson's position. The resulting deprivation of freedom may be more harsh for them and may require the State to make arrangements for their dependents that will be inferior to allowing them to keep them while on probation. In addition, the alternatives may be less appropriate to the achievement of the State's legitimate penal objectives than probation with appropriate conditions. Nevertheless, the State's interest in the integrity of its penal sanction is so fundamental that it will be forced to use more harsh, and less useful, alternatives if deprived of the middle ground by decisions such as that of the court below.[36] This result is inconsistent with the "fresh start" policy underlying the bankruptcy act.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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36 The holding below transforms what Respondent has done into the perfect crime. Connecticut clearly cannot afford to foster an atmosphere in which welfare theft, followed by conviction coupled with bankruptcy discharge, is perceived as the perfect crime. It will have no choice, if that happens, but to resort to the more severe and less appropriate sanction of imprisonment.

Respectfully submitted,

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